No. 77-961

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

vs.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION AND FINANCE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

BRIEF AMICI CURIAE ON BEHALF OF THE DOW CHEMICAL COMPANY AND THE SHELL OIL COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
CHERYL J. WRIGHT
FOX AND GROVE
233 South Wacker Drive
Suite 7818
Chicago, Illinois 60606
Attorneys for THE DOW CHEMICAL COMPANY and THE SHELL OIL COMPANY

Of Counsel:
JOHN E. DICKS
The Dow Chemical Company
47 Building
Midland, Michigan 48640
BRYNN AURELIUS
The Shell Oil Company
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

SORG/CHICAGO U.S.A.

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INTEREST OF THE AMICI CURIAE*

The Dow Chemical Company ("Dow") and Shell Oil Company ("Shell") are employers in interstate commerce, subject to both the bargaining obligations of the National Labor Relations Act (29 USC §§141 et seq.) and the unemployment compensation statutes of the various states in which they have employees, including New York. The decision in the Court below, permitting the State of New York to continue the practice of paying unemployment compensation benefits to striking employees, thus presents a question of substantial interest to both Dow and Shell. As will be demonstrated herein, the factual pattern now before this Court does not represent a single isolated incident, but is instead one of numerous similar, factual patterns frequently recurring throughout the Nation.

Dow, for example, is currently engaged in litigation in the United States District Court for the Eastern District of Michigan, now on interlocutory appeal to the United States Court of Appeals for the Sixth Circuit, which also contest the validity of the grant of state unemployment benefits to employees during a labor dispute. *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich., 1977), certified to the Sixth Circuit (E.D. Mich.) (May 19, 1977) (No. 77-8064). The history of that case closely resembles the instant litigation. In 1972 and 1974, the United States Steelworkers of America (the "Steelworkers") struck manufacturing facilities of Dow located at Bay City and Midland, Michigan. The strikers immediately applied for and in the substantial majority of situations received compensation benefits under the Michigan Unemployment Com-

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.

pensation Law, M.C.L.R. §421.29 (8).[1] This mass utilization of unemployment compensation benefits was not a fortuitous or unplanned development. It was an integral part of the Steelworkers' strike strategy, just as it was an integral component of the CWA's strike tactics in the present case, to utilize unemployment compensation benefits to aid members in withstanding the financial pressures of a strike and optimize the Union's capacity to maintain a strike.

Shell is similarly engaged in litigation contesting the validity of Washington's payment of unemployment compensation benefits to striking employees. *Shell Oil Co.* v. *Brooks,* No. C74-1935 (W.D. Wash.) That case arose out of a 1973 strike at Shell's Anacortes, Washington facility by employees who were members of the Oil, Chemical and Atomic Workers International Union. In order to maintain production during the strike, temporary arrangements, including the use of supervisory personnel and employee

[1] Initially the State, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from the interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period. As a result of this procedure, of the 166 strikers who participated in the Dow Bay City strike, 124 succeeded in circumventing the labor dispute disqualification and received unemployment benefits. Similarly, of the 5,000 employees that struck in March, 1974, at Dow's Midland plant by May, 1974, approximately 2,481 had commenced receiving benefits. On average the benefits received approximated almost 50 percent of each worker's net compensation. Consequently, the State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees.

transfers from other refineries, were implemented by Shell. Washington, however, permits unemployment compensation benefits to be paid strikers where a strike fails to substantially curtail the struck employer's production. As a result of this policy, which is virtually identical to that of Hawaii presented to this Court in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975), *petition for cert. filed* (No. 77-962), all of the Shell strikers received unemployment benefits for the duration of the strike. Again, as in *Hawaii Telephone* and *Dow*, the grant of unemployment benefits was the result of carefully orchestrated union efforts which had the effect of requiring Shell to finance the strike by directly increasing unemployment tax contributions.

The issue presented in the instant case, is therefore, of vital concern to both Dow and Shell as well as a substantial segment of American Industry. This litigation is not confined to the *New York Telephone* controversy; the factual basis and the ultimate effect of the payments made in both the *Shell* and *Dow* cases closely resemble those in the case at bar. Further, various preliminary opinions issued in the *Dow* case (see, e.g., *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972)) have been discussed by the parties in the present case and were in fact relied on by the District Court and the Court of Appeals in the opinions below. See, e.g., App. to Pet. at pps. 7a, 46a, 50a. Thus, the question before the Court—whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces" (*Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 427 U.S. 132 (1976))—is a recurrent question that is of great significance to the *amici*. It is for this reason that they respectfully submit their views to the Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Review should be granted in order to resolve a significant and recurrent question, not heretofore decided by this Court, that has engendered considerable confusion in the lower courts, *viz.*, whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces." *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 472 U.S. 132 (1976). This issue was expressly left open by this Court in *Ohio Bureau of Employment Services* v. *Hodory*, ... U.S. ....., 45 U.S.L.W. 4544 (Mar. 31, 1977) (No. 75-1707). It is now ripe for resolution and the instant case, as well as the companion petition in *Hawaiian Telephone*, Case No. 77-962, present this Court with appropriate vehicles for its urgently-needed resolution.

A. This Case Presents A Recurrent Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

The labor preemption problem in the past has been to determine the extent to which the lower courts were foreclosed from acting by the exclusive administrative jurisdiction of the National Labor Relations Board. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); and *Sears, Roebuck and Co.* v. *San Diego Carpenters, cert. granted*, No. 76-750. This historic focus on judicial interference with federally protected or prohibited employee activities has, however, now been recognized to be but one of "two categories" of labor problems. *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 427 U.S. 132 (1977). The open issue which must now be ad-

dressed—and an issue of similar magnitude[2]—is the permissible extent of the states' legislative power, albeit perhaps directed at non-labor objectives, to impinge upon federal labor policy. The particular variant of this question that is at issue in this case, state subsidies to strikers, has been a recurrent subject of substantial litigation,[3] and national controversy.[4] It now warrants resolution. The instant case, as well as the companion petition in *Hawaii Telephone*, provide appropriate vehicles for

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[2] See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337-1339 (1972): "From 1945 to 1960 no aspect of labor-management relations law gave rise to as much litigation and diversity of judicial opinion as the problems of fitting the basic federal labor legislation—the National Labor Relations Act, the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act—into the surrounding legal system. . . . Today the wind carries scent of change—or at least of reexamination. . . . The occasion seems ripe, therefore, for a review of the development of, and basic issues in, the law pertaining to federal occupation of the field of labor dispute."

[3] See, e.g., the cases cited at page 15 of the Petition, involving the grant of unemployment compensation benefits to strikers, and related litigation, such as *Batterton* v. *Francis*, 45 U.S.L.W. 4768 (June 21, 1977) (No 75-1181), and *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. den.* 402 U.S. 933 (1971), *reh. den.*, 404 U.S. 874 (1971), involving the grant of other forms of public asisstance to strikers.

[4] In *ITT Lamp Division*, for example, eleven states joined in urging this Court to grant review. The position of the states in that case reflected the serious dislocation that then prevailed and still prevails, as a result of the uncertainty existing in this area. Compare, e.g., the position of Iowa in its *amicus brief* in *ITT Lamp Division* in support of the petition for rehearing p. 3 ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its (footnote continued)

such a decision. The records in both cases were aggressively presented, including (1) microcosmic analyses of the strikes which precipitated each case; (2) documentary evidence rgarding the role of unemployment compensation in labor union strike tactics and bargaining strategies elsewhere; (3) the testimony of experienced management and union negotiators, and (4) macrocosmic analyses of the dynamics of labor disputes by expert labor economists and statisticians. With such records, this Court would for the first time be in a position to conduct the requisite "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature.'" *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 239-240.

B. Review By This Court Is Warranted To Resolve A Substantial Conflict Among The Courts Below.

Prior to issuance of the decision below, the lower courts had uniformly concluded that the instant dispute was one in which "the existing legislative record is not sufficiently clear to establish Congressional intent either way", and which could therefore, only be resolved after an empirical evaluation of the factual impact of the disputed state policies upon the federal collective bargaining scheme. *Grinnell*

(footnote continued)
brief in opposition (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The same difference of opinion continues to exist with regard to the availability of unemployment compensation benefits to strikers, the issue in the instant case.

Corp. v. *Hackett,* 475 F. 2d at 454. As the Court observed in *Dow*:

> . . . this court views the issue of supremacy as a mixed question of law and fact. This court does not believe, as defendants and intervenors suggest, that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent. Moreover, whether in fact the payment of unemployment compensation infringes an employer's collective bargaining right cannot be decided by this court on the pleadings submitted.

In diametric conflict with those decisions, however, the Second Circuit in the present case has now found Congressional tolerance of state unemployment insurance laws that conflict with the federal labor policy, and concluded that, as a matter of law, the states have been granted unbridled freedom to provide unlimited economic assistance to striking employees as long as that stream of public revenue is labelled as unemployment compensation benefits.

These contrary positions have resulted in an injunction prohibiting strikers from receiving unemployment compensation benefits actually issuing in the state of Hawaii and being possible in the First Circuit, while concurrently no such injunction may issue in the Second Circuit. Such a possibility of differing results on requests for injunctive relief in identical cases has been deemed a particularly appropriate situation for the grant of certiorari. *McCulloch* v *Sociedad Nacional,* 372 U.S. 10, 12 (1973). The continued existence of a conflict on such an important issue of labor-management relations impairs the effective implementation of federal labor policy. Review by this Court is warranted, therefore, to provide guidance to the lower courts and to "spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union,* 346 U.S. 485, 488 (1953).

C. The Decision Below Impermissibly Intrudes On Federal Labor Policy.

The decision below is contrary to the numerous decisions of the Court which have "made it abundantly clear that state attempts to influence the substantive terms of collective bargaining agreements are . . . inconsistent with the federal regulatory scheme." *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.,* 427 U.S. at 140, 177. The use of economic pressure is, of course, "part and parcel" of this federal scheme. *N.L.R.B.* v. *Insurance Agents Int'l Union,* 361 U.S. 477, 495 (1960); *H. K. Porter Co.* v. *N.L.R.B.,* 397 U.S. 99, 108 (1970). "The degree of economic power the parties possess", rather than the "Government . . . control[s] the results of the negotiations." *N.L.R.B.* v. *Insurance Agents Int'l Union,* 361 U.S. at 488, 489. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage". *American Shipbuilding Co.* v. *N.L.R.B.,* 380 U.S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, had repeatedly held that restriction on "either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959)] or the forms of pressure which are permissible [see *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm., supra; Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964)] tips the scale toward management or union", and is prohibited. The decision below ignores this careful balance. Where, as here, state action may have a coercive effect, whether direct or indirect, upon the parties to a labor dispute, it is prohibited by overriding federal labor policy.

CONCLUSION

For each of the foregoing reasons, as well as those set forth in the Petition, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
CHERYL J. WRIGHT
FOX AND GROVE
233 South Wacker Drive
Suite 7818
Chicago, Illinois 60606
Attorneys for
The Dow Chemical Company and
The Shell Oil Company

Of Counsel:
JOHN E. DICKS
The Dow Chemical Company
47 Building
Midland, Michigan 48640

BRYNN AURELIUS
The Shell Oil Company
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001